INTRODUCTION

Defendant Orion HealthCorp, Inc. ("Orion") respectfully submits this Brief in Opposition to the *Motion to Dismiss Defendant's Counterclaims* (the "Motion") filed by plaintiff GeBBS Healthcare Solutions, Inc. ("Plaintiff").

STATEMENT OF FACTS

The Counterclaims

Orion, both directly and through its network of subsidiaries, provides billing, collections, and management services to physicians and medical practices. [*First Amended Answer and Counterclaims* (the "*Amended Answer*"), Dkt. No. 32, pg. 6, ¶ 6.] Pursuant to a June 22, 2006 Master Services Agreement and three subsequent addenda thereto (collectively, the "MSA"), Orion 'outsourced' certain work to Plaintiff. [*Id.* at pgs. 6-7, ¶¶ 9-18.] In other words, the MSA contemplated that Plaintiff would act like a subcontractor and provide billing and collections services (the "Services") to Orion's customers. [*Id.*]

On October 11, 2016, after Plaintiff commenced this litigation to recover payments allegedly due under the MSA, Orion filed the *Amended Answer*, which includes the following three claims for relief against Plaintiff (the "Counterclaims").

Breach of Contract--Nonperformance

With its first claim for relief (the "Nonperformance Claim"), Orion alleges that Plaintiff breached the MSA by failing to properly perform the Services. [*Amended Answer*, pgs. 7-8, ¶¶ 19-22.] Of particular relevance to the Motion, Orion alleges that:

> [Plaintiff] breached its obligation under Paragraph 3 of Addendum 3 [to the MSA] in numerous respects, including by failing to (a) devote sufficient personnel and resources to its performance of the Services; (b) process new charges in a timely manner; (c) promptly pursue unpaid balances; and (d) maintain accurate records.

[*Id.* at pg. 8, ¶ 21.]

Breach of Contract--Improper Termination

In support of its second claim for relief (the "Improper Termination Claim"), Orion alleges that Plaintiff breached the MSA by prematurely and unjustifiably terminating that agreement and refusing to perform the Services. [*Id.* at pgs. 8-9, ¶¶ 23-30.] Indeed, after explaining that the MSA includes three termination provisions, each of which was intended to apply in a different situation and to require Plaintiff to provide a different amount of notice, Orion asserts that:

> [Plaintiff] purported to terminate the MSA [on ten days' notice] pursuant to Paragraph 5(c) of Addendum 3 based on Orion's supposed failure to pay [undisputed] amounts [Plaintiff] claimed as due. However, at the time [Plaintiff] canceled the Agreement, there were no undisputed amounts due and owing to [Plaintiff] from Orion.

[*Id.* at pg. 9, ¶ 28.]

In other words, Orion alleges that because Plaintiff did not have a right to invoke Paragraph 5(c) of Addendum 3 to the MSA, Plaintiff was required to give substantially more than ten days' notice prior to terminating the MSA.

Fraud

In its third claim for relief (the "Fraud Claim"), Orion alleges that Plaintiff made material misrepresentations of fact to extract roughly $190,000 from Orion. [*Id.* at pgs. 9-10, ¶¶ 31-36.] More specifically, Orion asserts that (a) "the parties agreed that if Orion made a partial payment against the balance purportedly due, [Plaintiff] would continue to perform the Services for a reasonable time" [*id.* at pgs. 9-10, ¶ 32.]; but (b) "[a]t the time it entered into that agreement, [Plaintiff] had no intention of continuing to perform the Services for Orion" [*id.* at pg. 10, ¶ 33.].

ARGUMENT

I. PLAINTIFF RELIES ON FACTUAL ALLEGATIONS THAT CANNOT BE PROPERLY ADJUDICATED ON A MOTION TO DISMISS AND SHOULD NOT BE CONSIDERED.

Rather than present arguments as to the viability of the Counterclaims under Rule 12(b)(6), the Motion is little more than a series of factual assertions offered to contradict Orion's allegations. This approach is entirely improper, and Plaintiff's factual assertions--improperly presented through counsel--should be disregarded. *See Reyes v. Cty. of Suffolk*, 995 F. Supp. 2d 215, 220 (E.D.N.Y. 2014) ("Generally, when a defendant attempts to counter a plaintiff's Complaint with its own factual allegations and exhibits, such allegations and exhibits are inappropriate for consideration by the Court at the motion to dismiss stage.") (citing *Dual Groupe, LLC v. Gans-Mex LLC*, 932 F. Supp. 2d 569, 572 (S.D.N.Y. 2013)).

II. THE MOTION SHOULD BE DENIED AS THE COUNTERCLAIMS HAVE BEEN PLED WITH THE REQUISITE SPECIFICITY.

Although its motion is largely devoted to factual disputes, Plaintiff also insinuates that the Counterclaims lack specificity. These vague arguments, which are not discussed in detail or supported by illustrative case law, do not justify dismissal.

A. The Nonperformance Claim and the Improper Termination Claim have been sufficiently pled

It is "well-established . . . that a party need not plead breach of contract claims with particularity". *United States Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, 2015 U.S. Dist. LEXIS 101155, at *6 (S.D.N.Y. July 29, 2015) (citing *Weiss v. La Suisse*, 69 F. Supp. 2d 449, 462 (S.D.N.Y. 1999)). Indeed, "[c]ourts have generally recognized that relatively simple allegations will suffice to plead a breach of contract claim even post-*Twombly* and *Iqbal*". *Merch. Cash & Capital LLC v. Edgewood Grp., LLC*, 2015 U.S.

Dist. LEXIS 94162, at *27 (S.D.N.Y. July 2, 2015) (quoting *Comfort Inn Oceanside v. Hertz Corp.*, 2011 U.S. Dist. LEXIS 126294, at *21 (E.D.N.Y. Nov. 1, 2011)). Accordingly, to sustain the Nonperformance Claim and the Improper Termination Claim, Orion was simply required to provide Plaintiff "with a short, plain notice of the claims against it pursuant to Rule 8". *Boart Longyear Ltd. v. All. Indus.*, 869 F. Supp. 2d 407, 413 (S.D.N.Y. 2012) (internal quotations marks omitted). It has clearly done so, and Plaintiff's assertions to the contrary are without merit.

It is unclear exactly why Plaintiff believes that the Improper Termination Claim lacks specificity. However, with respect to the Nonperformance Claim, Plaintiff offers the following short explanation:

> [The Nonperformance Claim] is a mere duplication of certain phrases that appear in Paragraphs 2 and 3 of the Addendum **(Exhibit B)** but do not [sic] provide specifics of the alleged non-performance.

[*Plaintiff's Memorandum of Law*, pgs. 4-5.]

While the Nonperformance Claim does note that the MSA required Plaintiff to perform the Services "using competent and qualified personnel in a professional and workmanlike manner, in accordance with the highest prevailing industry standards and practices for the performance of similar services" [*Amended Answer*, pg. 7, ¶ 20], Orion also alleges specific breaches of the MSA that are not, as Plaintiff suggests, derived from "phrases" in the MSA. Specifically, Orion asserts that Plaintiff breached the MSA by failing to "(a) devote sufficient personnel and resources to its performance of the Services; (b) process new charges in a timely manner; (c) promptly pursue unpaid balances; and (d) maintain accurate records". [*Id.* at pg. 8, ¶ 21.] These four examples of nonperformance are more than sufficient to provide Plaintiff "with a short, plain notice of the claims against it pursuant to Rule 8". *Boart Longyear Ltd. v. All. Indus.*, 869 F. Supp. 2d 407, 413 (S.D.N.Y. 2012) (internal quotations marks omitted). The Motion should, therefore, be denied.

B. Orion has sufficiently pled a claim for fraud

Plaintiff's arguments with respect to the Fraud Claim are vague and not supported with illustrative case law. However, by seeming to admit that Orion has alleged all the elements necessary to support a claim for fraud, but suggesting a failure to provide proof of the fraud or conclusively demonstrate justifiable reliance, Plaintiff again appears to have misconstrued the applicable legal standard. First, Orion has no obligation to 'prove' its case at this stage. Second, Orion has adequately pled justifiable reliance not only by alleging that it made a payment in reliance on Plaintiff's promise to continue performing the Services, but because there is nothing about the underlying events that suggests Orion's reliance was unjustified. *See CreditSights, Inc. v. Ciasullo*, 2007 U.S. Dist. LEXIS 25850, at *36-37 (S.D.N.Y. Mar. 26, 2007) ("In evaluating whether a plaintiff has adequately alleged justifiable reliance, a court may consider, for example, the sophistication and expertise of the plaintiff in financial matters, the existence of a fiduciary relationship, access to the relevant information, concealment of the fraud, and the opportunity to detect the fraud.") Accordingly, Plaintiff has not met its burden to establish "beyond doubt that [Orion] can prove no set of facts in support of [the Fraud Claim] claim which would entitle [Orion] to relief." Red Ball Interior Demolition Corp. v. Palmadessa, 908 F. Supp. 1226, 1237 (S.D.N.Y. 1995).

CONCLUSION

For the reasons set forth above, Orion respectfully requests that the Motion be denied.

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New York, New York

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